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MAR 21 1973
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In The Supreme Court of The United States

October Term, 1972

No. 72-857

LLOYD GEORGE McKINNON,

Petitioner,

v.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of the State of California (Appendices B, C, and D of Petition) is reported at 7 Cal. 3d 899, 103 Cal. Rptr. 897, 500 P. 2d 1097 (1972).

JURISDICTION

This Court does not have jurisdiction in this case under 28 U.S.C. §1257 because of the absence of final review below (Argument I).

QUESTION PRESENTED

May noncompliance with the Fourth Amendment requirement for a search warrant be excused when there is probable cause to search and there are exigent circumstances indicating that both the item to be searched and its owner are in the process of leaving the jurisdiction?

CONSTITUTIONAL AMENDMENT INVOLVED

The provisions of the United States Constitution, Amendment IV, are involved.

STATEMENT OF THE CASE

Petitioner, LLOYD GEORGE McKINNON, and a codefendant, were charged with transporting marijuana (California Health and Safety Code §11531) and possession of marijuana for sale (California Health and Safety Code §11530.5). Petitioner's motion to suppress the evidence pursuant to California Penal Code §1538.5 was granted by the trial court and the charges were dismissed. On appeal by the People, the Supreme Court of California reversed the orders suppressing the evidence and dismissing the charges. Petitioner seeks review of the decision by the Supreme Court of California, and this

brief in opposition is filed at the Court's request. The facts of the case are accurately summarized by the Court below at pp. B-2 and B-3 of the Petition.

ARGUMENT

I
THIS COURT LACKS JURISDICTION BECAUSE THE JUDGMENT IS NOT FINAL.

A judgment is not final unless it is subject to no further review in the State Court and there must be an effective determination of the litigation and not of intermediate steps therein. Market Street Railway Company v. Railroad Commission of California, 324 U.S. 548 (1945); Gospel Army v. Los Angeles, 331 U.S. 543 (1947); Southern Pacific Company v. Gileo, 351 U.S. 493 (1956); Wilson v. Schnettler, 365 U.S. 381 (1961).

The instant case lacks the prerequisite finality for review by this Court because the petitioner has yet to be brought to trial. This Court has indicated that the admissibility of evidence in state prosecutions is a matter to be resolved by state tribunals, Perez v. Ledesma, 401 U.S. 82, 84 (1971), and only in the event petitioner can show extraordinary circumstances where the danger of irreparable loss is both great and immediate will the Federal Courts intervene in a state prosecution. Younger v. Harris, 401 U.S. 37 (1971). More than four years have passed since petitioner was arrested on the instant charges and the parties have yet to litigate the ultimate issue of innocence or guilt.

In addition to the issue of guilt yet to be determined, the Fourth Amendment issues raised by petitioner are not

yet final under California law. Under California law, a defendant who desires to raise Fourth Amendment issues must use the procedure provided for in California Penal Code §1538.5 (West, 1972). This legislative procedure enacted in 1967 is the exclusive method by which to determine Fourth Amendment issues. As applied to felony crimes, California Penal Code §1538.5 (West, 1972) provides for a suppression hearing in the Superior Court prior to trial. The hearing is de novo (Cal. Pen. Code §1538.5, sub. (i)) (West, 1972). If the defendant's pretrial motion is denied, Cal. Pen. Code §1538.5, sub. (i) (West, 1972) further provides that the defendant can challenge the ruling prior to trial by way of writ of mandate or prohibition in the appellate courts. If, however, as in the instant case, the motion to suppress is granted, and the case is dismissed, the prosecution may appeal the ruling (§1538.5, sub. (o) (West, 1972). If, on appeal, the Fourth Amendment issues are decided adversely to the defendant, res judicata and the law of the case doctrine operate as a bar to a relitigation of the same issue at or before trial. People v. O'Brien, 71 Cal. 2d 394, 456 P. 2d 969, 79 Cal. Rptr. 313 (1969).

An important exception relevant to the instant petition is set forth in People v. Superior Court [Edmonds], 4 Cal. 3d 605, 483 P. 2d 1202, 94 Cal. Rptr. 250 (1971). Defendant Edmonds brought a motion to suppress in the Superior Court, which was denied. Towards the close of trial, Edmonds successfully urged the trial court to reconsider a second motion to suppress, which was granted. Edmonds urged the identical issue in each of the suppression motions: the legality of his arrest. However, Edmonds did not present additional evidence bearing on that issue in his second motion. The California Supreme Court held that the Superior Court had no jurisdiction to entertain at trial defendant's renewed motion to suppress which had previously been denied.

The Court relied upon its earlier holding in People v. O'Brien, supra. The Supreme Court went on to note:

> "It should be emphasized that the O'Brien rule is limited to preventing the renewal of a prior motion to suppress, rather than the making of a new motion based upon grounds either unavailable or unknown to defendant at the time his prior motion was denied. (Pen. Code, §1538.5, subd. (h).) Thus, for example, if there occurred an intervening change in the applicable law or the discovery of new evidence in support of suppression, the trial court could entertain a new motion based upon such grounds. In the instant case, however, defendant asserted no new grounds in support of his renewed motion to suppress." People v. Superior Court [Edmonds], supra, at 611, 483 P. 2d at 1206, 94 Cal. Rptr. at 254. 1/

1/ In People v. Superior Court [Edmunds], supra, there was no appellate review after denial of the first motion to suppress. No California court has been squarely presented with the procedural pattern where there has been pretrial appellate review and an attempt thereafter to obtain a further suppression hearing at trial based upon newly discovered evidence or an intervening change in the applicable law. It should be noted also that People v. Dubose, 17 Cal. App. 3d 43, 94 Cal. Rptr. 376 (1971), suggests in dicta that a suppression motion can be entertained by the trial court on the grounds of newly discovered evidence only where the motion is made for the first time at trial. People v.

(Continued next page)

Therefore, petitioner McKinnon may have the opportunity for a new motion to suppress at his trial, assuming the existence of the jurisdictional prerequisites as noted.

Assuming that petitioner McKinnon does not desire to make a new motion to suppress in the Superior Court, he is entitled to a post-conviction appeal on the lawfulness of the search. A defendant can appeal an adverse ruling on his motion to suppress even after a conviction based upon a finding of guilt (Cal. Pen. Code §1538.5, sub. (m) (West, 1972)) after a plea of nolo contendere (People v. Warburton, 7 Cal.App.3d 815, 86 Cal.Rptr. 894, cert.den. 400 U.S. 1022 (1970)), or upon a plea of guilty (People v. Jasso, 2 Cal.App.3d 955, 82 Cal. Rptr. 229 (1969)). The law is well settled, however, that where there has been appellate review on the merits pretrial, the decision is res judicata as to the subsequent appeal on the same issue. People v. Werber, 19 Cal. App.3d 598, 97 Cal.Rptr. 150 (1971). However, even where an appeal is a mere formality, this Court has still required the second final state review as a prerequisite to review by this Court. Great Western Telephone Company v. Burnham, 162 U.S. 339 (1896).

Thus, the finality necessary for review by this Court is lacking in three vital areas: the issue of guilt has yet to be adjudicated; petitioner has the opportunity to bring a new motion to suppress at trial subject to the qualifications already noted; finally, post-conviction appeal is available to petitioner.

(Continued from preceding page)
Dubose, supra, at 47, 94 Cal.Rptr. at 378. The Dubose case, however, was decided prior to the Supreme Court decision in People v. Superior Court [Edmonds], supra.

II

THE DECISION BY THE CALIFORNIA SUPREME COURT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner urges that the decision by the California Supreme Court is in conflict with this Court's decision in Chambers v. Maroney, 399 U.S. 42 (1970). For reasons set forth herein, the decision below is in complete accord with Chambers and other decisions of this Court with regard to searches and seizures.

The California Supreme Court recognized, and petitioner concedes, that there are several situations where the Fourth Amendment does not require a warrant for a search based upon probable cause.

Chambers reaffirmed a principle enunciated by this Court in Carroll v. United States, 267 U.S. 132 (1925), recognizing that the mobility of certain objects, such as automobiles, may justify a warrantless search based upon probable cause. The holding of the California Supreme Court in McKinnon, when properly considered within the context of the facts presented, is that a law enforcement officer need not obtain a search warrant to seize and search mobile goods in transit where time does not permit.

Petitioner has characterized the decision below as a blanket permit to search goods assigned to a common carrier, even where there are no exigent circumstances. Such is not the case decided below. Petitioner seeks to divorce language from certain portions of the opinion from the facts presented. Clearly the court below considered the exigent circumstances in order to decide that

a warrant was not required in these circumstances. Consideration of exigent circumstances as an excuse to the warrant requirement has clearly been approved by this Court not only in automobile cases, but indeed even in private houses. Warden v. Hayden, 387 U.S. 294 (1967).

Subsequent cases decided in California indicate that the opinion below has not been given the broad application that petitioner suggests. See People v. Laursen, 8 Cal. 3d 192, 501 P. 2d 1145, 104 Cal. Rptr. 425 (1972); People v. North, 8 Cal. 3d 301, ___ P. 2d ___, ___ Cal. Rptr. ___ (1972); People v. Mendez, 27 Cal. App. 3d 987, 104 Cal. Rptr. 322 (1972).

Therefore, there is no conflict presented by the case below for this Court to resolve. Thus, there has been no showing pursuant to Rule 19, Sub. 1(a) of the Rules of the Supreme Court, that the Court should grant review in writ of certiorari.

III

THE CASE AT BAR TURNS ON ITS OWN UNIQUE FACTS AND WOULD HAVE VERY LIMITED APPLICATION AND EFFECT.

The unique facts of this case make it inappropriate for a reconsideration of warrantless searches. The cartons, having been delivered to a common carrier, were placed by petitioner with the airline for transit to another state. The petitioner was listed as both consignor and consignee, indicating his intent to leave the state. Indeed, petitioner admits the implication that if he were not available in San Diego, he could be found at his

destination, Seattle (see Petition, p. 7). Obviously the impending departure would have placed petitioner beyond the reach of California officers.

The court below found, and petitioner does not dispute, that the searching officer had probable cause to believe that the cartons contained contraband. Thus, the question presented by this case is not whether an officer could lawfully search any goods consigned to a common carrier without a warrant based only upon probable cause. The California Supreme Court did not have to reach this question to decide the case, although dicta in the opening paragraph of the opinion might indicate such a broad holding at first blush.

Under the facts of the instant case, the question is whether an officer, knowing that the goods are about to be shipped by air freight, and knowing that the suspect is about to flee the jurisdiction, and having probable cause, is required to secure a search warrant; or, may the warrant requirements be excused because of these exigent circumstances.

The court below has answered this question in accordance with the decisions of this Court dealing with exigent circumstances. Warden v. Hayden, supra; Preston v. United States, 376 U.S. 364 (1964). Therefore, any examination of the warrantless search in this case would be of limited application and effect because of the peculiar circumstances. In particular, the fact that the searching officer knew of the petitioner's impending flight compelled an immediate verification of the contents of the cartons. The often lengthy delay occasioned by securing a search warrant would certainly have led to a frustration of the officer's attempt to apprehend the petitioner. Thus, the facts presented here limit the Court in any consideration of the more common

types of searches conducted at airports. Furthermore, drastic changes in airport search regulations and procedures since March 1969 render the case at bar of little contemporary significance.

CONCLUSION

A writ of certiorari should not issue because there is no final judgment in the case below. Only after petitioner has been tried and, in the event of conviction, has exhausted the state appellate procedures, would this Court have jurisdiction.

A writ of certiorari would be improvident in this case for the further reason that the decision below does not conflict with the decisions of this Court. The warrantless search conducted by the officer conforms to the Fourth Amendment standards as interpreted in Carroll, Chambers, and other decisions of this Court.

Finally, the unique facts of petitioner's case make it an inappropriate vehicle for reconsideration of the Fourth Amendment issue raised by petitioner. The holding of the case must be considered in the light of the circumstances dictating a prompt search.

For the foregoing reasons, respondent respectfully requests this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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